

## The Families First Coronavirus Response Act – Employer FAQs

*Updated March 28, 2020 based on guidance provided by the U.S. DOL (in red and underlined)*

According to 2019 U.S. Small Business Administration (SBA) figures, small and medium-sized businesses (SMB) account for 59.9 million workers, 47 percent of the country's workforce. One of the many issues that have my SMB brethren concerned (that's an understatement, right?) is that a countless number of them are now in the midst of an operational crisis based on factors completely out of their control. What's more, these employers are scrambling to understand and implement complex state and federal paid sick time and paid leave legislation, with little or no agency guidance.

The Families First Coronavirus Response Act (FFCRA) includes several provisions, but two (2) will have a significant impact on SMBs with *fewer than 500 employees*. Particularly concerning is the FFCRA's emergency leave protections, which are effective **April 1, 2020**.

**If, at the time an employee's leave is to be taken, an employer employs fewer than 500 employees in the US (including US territories), the employer is subject to the Act. Further, single-enterprise (common ownership/management) and joint-employer tests may apply.**

Many of the business owners I've spoken with are both overwhelmed and discouraged, with no confidence that the law will provide the necessary relief to their employees or their businesses in a timely way. A heartbreaking number of small business owners commented that they are struggling to survive and believe they may be out of business before relief becomes available.

While facing business and personal pressures most of us have never experienced, SMBs will need to implement the paid leave provisions of the FFCRA, often with no confidence in their ability to afford it.

To following questions and answers should help uncloak some of the FFCRA's most pressing mandates:

**Q: Are employers paying for the FFCRA's emergency paid FMLA and paid sick leave?**

**A:** In short, yes. But it is much more complicated.

Employers covered by the FFCRA will initially be responsible for paying eligible employees for both forms of emergency paid leave. The first is a new form of emergency paid leave under the Family and Medical Leave Act (FMLA). The calculation for "emergency" FMLA will be based on the number of hours an eligible employee would normally be scheduled to work. The FFCRA

requires that the payment not be less than two-thirds (2/3) of the employee's regular rate of pay with a cap of \$200 per day and \$10,000 in total.

Second is the FFCRA's paid sick leave provision, which will provide eligible full-time employees with up to 80 hours of paid sick leave. Part-time employees will be eligible for paid sick leave time equal to an average number of hours the employee would otherwise be scheduled to work over a two-week period, and calculated at the employee's "required compensation" (i.e., the higher of the employee's *regular rate of pay* or the applicable minimum wage). The FFCRA mandated paid sick leave will not carry over from 2020 to 2021.

This is where this paid sick leave gets complicated. The payout will vary based on the reason for the leave.

An eligible employee will be entitled to the maximum amount—up to \$511 per day and \$5,110 in total—which is based on the greater of the employee's regular rate of pay or the minimum wage rate, if the employee is:

- a) subject to a local, state, or federal quarantine;
- b) has been advised by a healthcare provider to self-quarantine; or
- c) is experiencing symptoms of COVID-19 and are seeking a medical diagnosis.

However, an eligible employee taking the leave for other reasons (below) will be entitled to a lesser payment—up to \$200 a day and \$10,000 in total—which is based on two-thirds (2/3) of the employee's regular rate of pay or the minimum wage rate, whichever is greater, for the number of hours the employee is regularly scheduled to work, if the employee is:

- d) caring for an individual subject to a federal, state or local quarantine or isolation;
- e) caring for a child whose school/place of care is closed or whose care provider is unavailable; or
- f) dealing with a "substantially similar condition..."

Now the potentially crushing news...SMB employers are responsible for paying employees for both Emergency FMLA and Emergency Paid Sick Leave. Reimbursement will be available through refundable tax credits for covered employers that provide paid sick leave under the Emergency Paid Sick Leave provisions and paid childcare leave under the Emergency FMLA Amendment. Covered employers can claim two (2) new tax credits and get "fast funds" based on qualifying paid leave provided to employees between the Act's effective date of April 1, 2020, and December 31, 2020. Employers can retain an amount of payroll taxes equal to the amount of qualifying sick and childcare leave paid to employees. This is a dollar-for-dollar tax deposit offset. (Additional guidance on the reporting mechanics is expected to be released prior to April 1, 2020.) Many SMBs are still concerned that this situation could destroy many small businesses that simply do not have the cash to pay for the mandated sick leave and emergency FMLA leave.

## **Q: How does the FFCRA's Emergency FMLA leave provision work?**

**A:** The FFCRA amends the FMLA to provide up to 12 weeks of emergency, job-protected leave if an eligible employee is unable to work or telework due to a need to care for their son or daughter (under age 18) because the child's/children's school or place of care has closed, or their childcare provider is unavailable due to a public health emergency related to the COVID-19 Coronavirus.

Employers with fewer than 25 employees are exempt from the *job-protected aspect* of this leave when the following conditions are met:

- An employee takes emergency FMLA leave under the FFCRA.
- The employee's position is eliminated due to "*economic conditions*," or other changes that affect the employer's operations, resulting from the public health emergency.
- The employer makes "*reasonable efforts*" to restore the employee to a position equivalent to the position held at the time of the leave, including equivalent pay, benefits, and other terms and conditions of employment.
- If the employer's "reasonable efforts" to restore the employee to their position fails, the employer must make an effort to contact the employee if an equivalent position becomes available within a period set by the legislation.

*The first 10 days of emergency FMLA leave is unpaid leave.* However, employees may choose to use any employer-provided accrued vacation leave, personal leave, medical or sick leave, or emergency paid sick leave during the unpaid 10-day period. In either case, the remaining 10 weeks of leave will be paid by the employer, based on the calculations described above.

What remains unknown is whether employers can *require* employees to use accrued leave during the initial unpaid 10-day period. The U.S. Department of Labor (DOL) is expected to provide additional guidance soon. In the meantime, employers should clearly explain the options available to employees, including through revised policies.

In addition, for employers currently covered by traditional FMLA, a possibility exists that the FFCRA's provisions could intersect with traditional FMLA. For example, employees with serious health conditions related to COVID-19 may be eligible to take advantage of the two-week paid sick leave mandated by the FFCRA. Then, after that two-week period ends, these employees may move into an unpaid leave status, because they are covered by the provisions of traditional FMLA.

## **Q: If an employer provides an employee with a laptop and other tools necessary to work from home (telework), how can the employee claim to be unable to work?**

**A:** An employee may be unable to work, even with a laptop and the necessary tools to complete their job, for one or more of the COVID-19 qualifying reasons included in the FFCRA.

For example, an employee caring for their child(ren) whose school is closed or childcare provider is unavailable due to COVID-19 may not be able to work during the day. However, if the employee and the employer agree that the employee will work outside their normally scheduled hours (i.e., early morning, at night, during the weekend), then the employee would be able to work.

**Q: Are other exemptions from the FFCRA provisions available?**

**A:** Additional exemptions may be available under limited circumstances.

The DOL may create exemptions from both the emergency FMLA and sick leave provisions, under similar circumstances. The DOL may promulgate regulations to exempt certain employers from the FFCRA's provisions, including:

- a) healthcare providers and emergency responders; and
- b) small businesses with fewer than 50 employees, if the law's requirements would jeopardize the viability of the business. It is granted identical power with respect to the paid sick leave.

While it's likely to take a while for the DOL to determine how the exemption process will work, there are other important considerations for employers. Along with the short-term needs of the business, employers should keep their long-term employee relationships in mind. If other employers, including your competitors, are providing their employees with time off, and you're not, what effect will that have on them and their future loyalty?

**Q: If an employer operates in an area (city or state) where accrued paid sick leave is mandated, does that leave stack with the FFCRA's paid sick leave?**

Employers in jurisdictions like New York City and states like New Jersey with mandatory accrued paid sick leave will have many more questions than answers. Right now, it's unclear which mandated paid leave gives way to another. Without guidance from the DOL, we don't know how to handle situations where mandated paid leave entitlements meet the FFCRA paid leave obligations. Unfortunately, it's likely to take the DOL a while to get around to this guidance.

It's important to note that the FFCRA prohibits employers from requiring employees to use other employer-provided paid leave before uses the FFCRA paid sick leave.

Also, the FFCRA's paid sick time provision is available for employees to use immediately, regardless of how long an employee has worked for the employer. Further, the employer may not require an employee to find their own replacements for any shifts missed as a result of the employee using paid sick time.

**Q: Are employers required to inform employees about the FFCRA paid sick leave?**

Each employer is required to post this notice, and keep this notice posted, in a conspicuous place where notices are typically posted, and where all employees can see the notice. This may require posting in more than one business location to ensure all employees can see the notice.

A covered employer may satisfy this requirement by emailing or mailing a hardcopy of this notice to employees. Employers may also post this employee notice on an internal website used to post employee information, or an external website.

Covered employers are not required to share the notice with laid-off employees. The paid leave applies to current employees only.

The poster is available at:

[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

## Is the DOL going to provide a “grace period” for employer good-faith efforts?

The DOL will provide a temporary “period of non-enforcement” through April 17, 2020, as long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole by the employer as soon as practicable, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

Information related to the available *Tax Credits*, the *Emergency Paid Sick Leave Act* and the *Emergency Family and Medical Leave Act*, all included under the *Families First Coronavirus Response Act*, is available on the HR Compliance Experts’ **Coronavirus Resources** webpage at: <https://hrcexperts.com/coronavirus-covid-19-resources/>

If you have any questions, or require further information regarding these or other related issues, please contact Frank Cania at [frank@hrcexperts.com](mailto:frank@hrcexperts.com), or 585-416-0751.

**Check for additional updates on the HR Compliance Experts’ **Coronavirus Resources** webpage at <https://hrcexperts.com/coronavirus-covid-19-resources/>**

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